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Settlement

1 UNITED STATES DISTRICT COURT
2 SOUTHERN DISTRICT OF NEW YORK

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3 JOSE LUIS SANCHEZ,
4 individually and on behalf of
others similarly situated,

5 Plaintiffs,

New York, N.Y.

6 v.

14 Civ. 5468 (HBP)

7 CHARITY RESTAURANT CORP.
8 (d/b/a CARIDAD
RESTAURANT), LAZARO PICHARDO
and RUBEN PICHARDO,

9 Defendants.

10 -----x

11 December 3, 2015
12 10:38 a.m.

13 Before:

14 HON. HENRY B. PITMAN,

15 District Judge

16 APPEARANCES

17 MICHAEL FAILLACE & ASSOCIATES, P.C.
Attorneys for Plaintiffs
18 BY: SHAWN CLARK

19 HANG & ASSOCIATES, PLLC
Attorneys for Defendants
20 BY: JIAN HANG

21 - also present -

22 Steven Maldonado
Lydia Kutcher,
23 Spanish Language Interpreters

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1 THE COURT: Good morning. Please be seated, all.

2 THE CLERK: Sanchez against Charity Restaurant
3 Corporation.

4 Counsel, please state your name for the record.

5 MR. CLARK: Good morning, your Honor. Shawn Clark for
6 the plaintiff. Also seated with me at counsel table is a
7 translator, Mr. Steven Maldonado, as well as the plaintiff in
8 this case, Mr. Jose Luis Sanchez.

9 MR. HANG: Good morning, your Honor. Jian Hang, from
10 Hang & Associates, PLLC, representing all defendants in this
11 case.

12 On my left side is the individual defendant Ruben
13 Pichardo. In the middle is the translator, and the last is the
14 individual defendant Lazaro Pichardo.

15 Thank you, your Honor.

16 THE COURT: All right. Thank you.

17 I think the first order of business will be for
18 Mr. Hampton to swear the two interpreters.

19 I'm sorry, Mr. Clark, your interpreter's name is what?

20 MR. CLARK: Mr. Steven Maldonado.

21 THE COURT: OK. Mr. Hampton, could you swear in
22 Mr. Maldonado.

23 (Interpreter Steven Maldonado was sworn)

24 THE CLERK: Thank you.

25 THE COURT: And, Mr. Hang, your interpreter's name is?

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1 What is the name of your interpreter, Mr. Hang?

2 INTERPRETER KUTCHER: I am Lydia Kutcher. Lydia,
3 L-y-d-i-a; last name Kutcher, K-u-t-c-h-e-r.

4 THE COURT: OK. Mr. Hampton, could you swear
5 Ms. Kutcher.

6 (Interpreter Lydia Kutcher was sworn)

7 THE CLERK: You may be seated.

8 THE COURT: All right. Mr. Clark, where do we stand?

9 MR. CLARK: Your Honor, we have reached a settlement
10 agreement this morning right before trial in this matter. I
11 believe, given the history of this case, if we could put the
12 settlement on the record -- and to what extent your Honor is
13 comfortable with, we could speak to the fairness of the
14 settlement -- it would be advantageous rather than waiting for
15 a formal settlement document to be prepared and executed and a
16 more formal fairness submission.

17 THE COURT: Do you want to put the terms of the
18 settlement on the record.

19 MR. CLARK: Yes, your Honor.

20 The settlement terms are \$140,000 over two-and-a-half
21 years, with a down payment of \$25,000 due within 45 days of
22 final approval of the settlement. A confession of judgment is
23 to be executed by the defendants for \$140,000 minus any
24 payments made on the settlement. The settlement funds will be
25 paid by a 1099 to Michael Faillace & Associates.

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1 The attorney's fees in the case --

2 THE COURT: One second.

3 (Pause)

4 Go ahead.

5 MR. CLARK: And the attorney's fees in the case,
6 pursuant to the retainer agreement for the plaintiff in this
7 matter, are 40 percent of the settlement amount.

8 THE COURT: And those are the material terms of the
9 settlement agreement?

10 MR. CLARK: To plaintiff's understanding, yes.

11 THE COURT: And I presume the parties also will
12 exchange general releases?

13 MR. CLARK: Yes, your Honor.

14 THE COURT: OK. If the case proceeded to trial, how
15 much does the plaintiff say Mr. Sanchez could recover?

16 MR. CLARK: Yes, your Honor. In the event that trial
17 went forward and the plaintiff recovered the total amount that
18 he is owed, our estimate of damages would be that he receives
19 overtime damages of \$98,580.

20 THE COURT: I'm sorry, give me that number again,
21 please.

22 MR. CLARK: \$98,580 in overtime damages.

23 THE COURT: Go ahead.

24 MR. CLARK: Liquidated damages and prejudgment
25 interest on overtime damages of \$179,198.44.

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1 THE COURT: Mm-hmm.

2 MR. CLARK: In addition, there are New York Labor Law
3 annual wage notice and wage statement claims in the case, and
4 both of those would have damages of \$2,500. All --

5 THE COURT: A total of 2,500 plus 2,500?

6 MR. CLARK: Yes, your Honor.

7 And then, also, all the claims are attorney's-fees
8 bearing claims.

9 THE COURT: So if Mr. Sanchez prevailed on all claims,
10 his recovery exclusive of attorney's fees would be
11 approximately \$280,000?

12 MR. CLARK: Yes, your Honor.

13 THE COURT: All right. And do you want to tell me why
14 this settlement is reasonable from the plaintiff's point of
15 view.

16 MR. CLARK: Yes, your Honor. There are a few
17 different issues in the case.

18 Substantively, the primary issues are, first, as to
19 the FLSA claim, a question of whether the elements of
20 enterprise jurisdiction have been met. In particular, the
21 defendants allege, and their tax returns suggest, they could
22 potentially have a gross volume of sales of under \$500,000.

23 Now, I believe that there is both -- there would be
24 adequate testimony in the record from our plaintiff and his
25 recollection and knowledge of the business it carried out in

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1 order to support a finding on the FLSA claims that enterprise
2 coverage does exist, however, that would be a disputed issue in
3 the case.

4 In the event that enterprise coverage was not found,
5 certainly our argument would be, and what has been accepted by
6 many courts here in the Southern District, that the \$500,000
7 issue is an element of the FLSA claim rather than purely a
8 jurisdictional matter. There is some question about that and
9 what the consequences of failing to prove in the eyes of the
10 fact finder the \$500,000 element of this particular claim.

11 The other issue in this case is the defendants'
12 ability to pay. This is the defendants' third attorney in this
13 matter. There was a previous settlement in this case which
14 defendants refused to sign the final documents for. My
15 understanding of the reason for that is that they did not
16 realize that they did not have the financial resources to pay
17 that settlement and that the only alternative to going forward
18 with the case was personal and corporate bankruptcy. Given
19 this aspect of the case, plaintiffs have to balance both the
20 potential risks in the case, the potential recovery in the
21 case, and the potential that plaintiff will obtain a judgment
22 that he cannot effectively enforce.

23 In light of all --

24 THE COURT: The prior settlement that defendants
25 refused to sign, what was the amount of that settlement?

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1 MR. CLARK: My recollection is it was \$150,000 and
2 over a term of six months.

3 THE COURT: I see.

4 MR. CLARK: So the plaintiff has had in this
5 settlement agreement to compromise in both the amount and the
6 period of time for repayment. I am happy to report that he did
7 not compromise significantly as to the amount and instead most
8 of the change in the material terms of the settlement reflect
9 an increased payment term, which I think fairly -- is a fair
10 compromise in light of the issues raised concerning the
11 individual defendants and the corporate defendant's financial
12 situation.

13 THE COURT: My understanding from the pretrial
14 submissions is that the parties also dispute the number of
15 hours that Mr. Sanchez worked.

16 MR. CLARK: That is true, your Honor. I will say that
17 in this particular case no records whatsoever were maintained
18 by the defendants, and, accordingly, plaintiffs believe that
19 after trial the plaintiff's version of hours worked and pay
20 received would be found, but that does remain a contested
21 aspect of the case.

22 THE COURT: All right. Anything else you want to tell
23 me, Mr. Clark?

24 MR. CLARK: Nothing for the plaintiffs, your Honor.

25 THE COURT: OK. Mr. Sanchez, you've heard everything

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1 that Mr. Clark just said, is that correct?

2 MR. SANCHEZ: Yes, sir.

3 THE COURT: OK. And did Mr. Clark's description of
4 the settlement accurately reflect your understanding of the
5 settlement?

6 MR. SANCHEZ: Yes, sir.

7 THE COURT: OK. And do you agree to those settlement
8 terms as Mr. Clark described them?

9 MR. SANCHEZ: Yes, sir.

10 THE COURT: OK. All right. Mr. Hang, has Mr. Clark
11 accurately stated the terms of the settlement?

12 MR. HANG: Yes, your Honor.

13 THE COURT: Mr. Lazaro Pichardo, did you hear
14 Mr. Clark, the attorney for Mr. Sanchez, did you hear Mr. Clark
15 describe the terms of the settlement?

16 MR. L. PICHARDO: Yes.

17 THE COURT: Did Mr. Clark accurately describe the
18 terms of the settlement as you understand them?

19 MR. L. PICHARDO: Yes, your Honor.

20 THE COURT: And are you agreeing to the terms of the
21 settlement that Mr. Clark described both on behalf of yourself
22 and on behalf of Charity Restaurant Corporation?

23 MR. L. PICHARDO: Yes, your Honor.

24 THE COURT: All right. And Mr. Ruben Pichardo, the
25 same questions. Do you understand the terms of the settlement

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1 as Mr. Clark described them?

2 MR. R. PICHARDO: Yes, your Honor.

3 THE COURT: And did his description of the terms of
4 the settlement accurately reflect your understanding of the
5 settlement?

6 MR. R. PICHARDO: Yes, your Honor.

7 THE COURT: And do you agree to the terms of the
8 settlement as Mr. Clark described them both on behalf of
9 yourself and on behalf of Charity Restaurant Corporation?

10 MR. R. PICHARDO: Yes, your Honor.

11 THE COURT: OK. Mr. Clark, just one question. The
12 Confession of Judgment, is that going to be on behalf of all
13 three defendants?

14 MR. CLARK: That is my understanding. Certainly
15 that's something that if Mr. Hang has some clarification on
16 that he would like to make, I am welcome to hear it, but my
17 understanding is the Confession of Judgment will be on behalf
18 of all three defendants.

19 THE COURT: Mr. Hang, is that your understanding?

20 MR. HANG: Yes, your Honor.

21 THE COURT: Just one other sort of technical matter
22 here I just want to raise with counsel to make sure there is no
23 kerfuffle down the road.

24 Mr. Hang, the substitution of counsel here is
25 procedurally defective under the local civil rules. The Local

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1 Civil Rule 1.4 provides, "An attorney who has appeared as
2 attorney of record for a party may be relieved or displaced
3 only by order of the Court and may not withdraw from a case
4 without leave of the Court granted by order. Such an order may
5 be granted only upon a showing, by affidavit or otherwise, of
6 satisfactory reasons for withdrawal or displacement and the
7 posture of the case, including its position, if any, on the
8 calendar."

9 A notice of substitution was filed here but there was
10 no application for a court order -- or a notice of appearance
11 was filed but there was no application for a court order. I
12 just want to inquire -- because of that wrinkle, I just want to
13 inquire both of the individual defendants: Mr. Lazaro
14 Pichardo, you are satisfied with Mr. Hang's representation, is
15 that correct?

16 MR. L. PICHARDO: Yes, your Honor.

17 THE COURT: And you are agreeing to be bound by the
18 settlement that we discussed here today, correct?

19 MR. L. PICHARDO: Yes.

20 THE COURT: Mr. Ruben Pichardo, the same question.
21 You are satisfied with Mr. Hang's representation?

22 MR. R. PICHARDO: Yes, your Honor.

23 THE COURT: And you are agreeing to the settlement
24 that we have discussed here today, correct?

25 MR. R. PICHARDO: Yes, your Honor. It is correct.

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1 THE COURT: OK. All right. Mr. Hang, I am going to
2 issue -- I mean, the order approving the settlement, which I am
3 going to grant, is also going to substitute you as counsel, but
4 in the future you really do need to comply with Local Civil
5 Rule 1.4.

6 MR. HANG: Yes, your Honor. Thank you.

7 THE COURT: OK. All right.

8 Mr. Clark, anything else we should be considering from
9 your point of view?

10 MR. CLARK: Nothing for the plaintiffs.

11 THE COURT: OK. Mr. Hang, anything else from your
12 point of view?

13 MR. HANG: Nothing, your Honor. Thank you.

14 THE COURT: OK. Thank you all very much.

15 MR. CLARK: Thank you, your Honor.

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